

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

KENARD DALES,)	
Plaintiff)	
)	
v.)	Civil Action No. 1:04cv00093
)	<u>MEMORANDUM OPINION</u>
JO ANNE B. BARNHART,)	
Commissioner of Social Security,)	By: PAMELA MEADE SARGENT
Defendant)	United States Magistrate Judge

In this social security case, I vacate the final decision of the Commissioner denying benefits and remand the case to the ALJ for further consideration.

I. Background and Standard of Review

Plaintiff, Kenard Dales, filed this action challenging the final decision of the Commissioner of Social Security, (“Commissioner”), denying plaintiff’s claim for disability insurance benefits, (“DIB”), under the Social Security Act, as amended, (“Act”), 42 U.S.C.A. § 423 (West 2003). Jurisdiction of this court is pursuant to 42 U.S.C. § 405(g). This case is before the undersigned magistrate judge upon transfer pursuant to the consent of the parties under 28 U.S.C. § 636(c)(1).

The court’s review in this case is limited to determining if the factual findings of the Commissioner are supported by substantial evidence and were reached through application of the correct legal standards. *See Coffman v. Bowen*, 829 F.2d 514, 517 (4th Cir. 1987). Substantial evidence has been defined as “evidence which a reasoning

mind would accept as sufficient to support a particular conclusion. It consists of more than a mere scintilla of evidence, but may be somewhat less than a preponderance.” *Laws v. Celebrezze*, 368 F.2d 640, 642 (4th Cir. 1966). ““If there is evidence to justify a refusal to direct a verdict were the case before a jury, then there is “substantial evidence.””” *Hays v. Sullivan*, 907 F.2d 1453, 1456 (4th Cir. 1990) (quoting *Laws*, 368 F.2d at 642).

The record shows that Dales filed his application for DIB on or about June 15, 2003, alleging disability as of October 22, 2000, based on back pain, leg pain, arthritis and depression. (Record, (“R.”), at 47-50, 60-61.) The claim was denied initially and upon reconsideration. (R. at 23-25, 28, 29-31.) Dales then requested a hearing before an administrative law judge, (“ALJ”). (R. at 32.) The ALJ held a hearing on January 7, 2004, at which Dales was represented by counsel. (R. at 202-22.)

By decision dated April 28, 2004, the ALJ denied Dales’s claim for benefits. (R. at 14-20.) The ALJ found that Dales met the disability insured status requirements of the Act through the date of the decision.¹ (R. at 19.) The ALJ also found that the medical evidence established that Dales had severe impairments, namely residuals of a traumatic back injury, degenerative disc disease and situational depression, but he found that Dales did not have an impairment or combination of impairments listed at or medically equal to one listed at 20 C.F.R. Part 404, Subpart P, Appendix 1. (R. at 19.) The ALJ further found that Dales’s allegations regarding his limitations were not

¹Although the ALJ did not make a specific finding that Dales had not engaged in substantial gainful activity since his alleged onset date as required by the Act, he impliedly found so because he proceeded with the remaining steps of the analysis for determining whether Dales was entitled to DIB benefits. *See* 20 C.F.R. § 404.1520(a) (2004). I further note that there is no evidence contained in the record that Dales engaged in substantial gainful activity since his alleged onset date.

totally credible. (R. at 20.) The ALJ found that Dales had the residual functional capacity to perform light² work with only occasional stooping, kneeling, crouching and crawling. (R. at 20.) Thus, the ALJ found that Dales could not perform his past relevant work. (R. at 20.) Based on Dales's age, education, work experience and residual functional capacity and the testimony of a vocational expert, the ALJ found that other jobs existed in the national economy that Dales could perform, including those of a ticket taker and a sales attendant. (R. at 20.) Therefore, the ALJ found that Dales was not disabled at any time through the date of his decision and was not eligible for DIB benefits. (R. at 20.) *See* 20 C.F.R. § 404.1520(g) (2004).

After the ALJ issued his decision, Dales pursued his administrative appeals, (R. at 9), but the Appeals Council denied his request for review. (R. at 5-8.) Dales then filed this action seeking review of the ALJ's unfavorable decision, which now stands as the Commissioner's final decision. *See* 20 C.F.R. § 404.981 (2004). The case is before this court on the Commissioner's motion for summary judgment filed February 14, 2005.

II. Facts

Dales was born in 1974, (R. at 47), which classifies him as a "younger person" under 20 C.F.R. § 404.1563(c) (2004). Dales has a high school education with two years of college³ and past work experience as a coal miner, a truck driver and a produce clerk. (R. at 62-63, 74, 205.)

²Light work involves lifting items weighing up to 20 pounds at a time with frequent lifting or carrying of items weighing up to 10 pounds. If someone can perform light work, he also can perform sedentary work. *See* 20 C.F.R. § 404.1567(b) (2004).

³Dales testified that he was attending Radford University at the time of the hearing. (R. at 205.)

Dales testified at his hearing that he had to stop working when he was injured in a work-related accident on October 22, 2000, while working in the coal mines. (R. at 205.) He underwent surgery the following month for a herniated disc. (R. at 205.) At the time of the hearing, Dales testified that he was receiving workers' compensation benefits. (R. at 205.) He stated that his back pain ceased following surgery, but had gradually returned, worsening over the previous year. (R. at 206.) Dales testified that standing, walking fast, bending and stooping triggered his back pain. (R. at 206-07.) He estimated that he could stand for approximately 10 minutes without interruption and that he could lift three gallons of milk. (R. at 207, 217.) Dales testified that he laid on a hard, flat floor and elevated his feet, took hot baths, had his wife massage the back of his knees and used hot patches in an effort to relieve his pain. (R. at 207.) He stated that he spent a couple of hours lying down with his feet elevated daily. (R. at 207.) Dales testified that he had difficulty driving and riding in a vehicle, stating that he could do so for approximately 40 minutes before having to take a break. (R. at 208.) He further noted that he kept a heating pad in his car that he used during these breaks. (R. at 208.) Dales testified that during classes, he had to shift in his seat, "bow [his] back" and stretch his leg out into the aisle to try to relieve his pain. (R. at 209.) He stated that he would be unable to sit for three or four hours at a time due to pain. (R. at 209.) He stated that he sometimes had to leave class in order to stretch his back and legs. (R. at 209.)

Dales testified that he experienced depression as a result of his pain. (R. at 210.) He stated that he had been seeing a mental health counselor for three months, which had helped. (R. at 211.) Dales further stated that he was taking medication for his depression, which seemed to help "take the edge off." (R. at 211.) He testified

that he tried to help around the house, but was unable to do so. (R. at 211.) Dales further stated that he could not handle his three kids due to his “nerves.” (R. at 211.) He stated that he preferred to be alone. (R. at 212.) Dales testified that he experienced crying spells and had difficulty concentrating while in class. (R. at 212.) He further testified that he had no urge to socialize because he lacked patience. (R. at 212.) He stated that he was irritable and grouchy, taking his frustrations out on his wife. (R. at 212-13.) Dales testified that before his injury, he used to hunt, fish, draw and sketch, activities that no longer interested him. (R. at 213.)

Jean Hambrick, a vocational expert, also was present and testified at Dales’s hearing. (R. at 218-21.) Hambrick classified Dales’s work as various types of equipment operators as medium⁴ and semi-skilled and his work as a underground labor miner as heavy⁵ and unskilled. (R. at 219.) Hambrick was asked to consider an individual of Dales’s age, education and past work experience, who could perform light work limited by occasional stooping, kneeling, crouching and crawling. (R. at 219.) Hambrick testified that such an individual could perform the light, unskilled jobs of a ticket taker and a sales attendant. (R. at 219.) Hambrick was next asked to assume the same individual, but who was limited as set forth in Dr. Woods’s assessment. (R. at 220.) Hambrick testified that such an individual would be able to perform the same jobs previously mentioned. (R. at 220.) Hambrick was further

⁴Medium work involves lifting items weighing up to 50 pounds at a time with frequent lifting and carrying of items weighing up to 25 pounds. If someone can perform medium work, he also can perform light and sedentary work. *See* 20 C.F.R. § 404.1567(c) (2004).

⁵Heavy work involves lifting items weighing up to 100 pounds at a time with frequent lifting and carrying of items weighing up to 50 pounds. If someone can perform heavy work, he also can perform medium, light and sedentary work. *See* 20 C.F.R. § 404.1567(d) (2004).

asked to consider the same individual, but who was limited to standing for only 10 minutes without interruption, thus having to leave his work station for a few minutes at a time. (R. at 220.) Hambrick testified that there would be no jobs that such an individual could perform. (R. at 220.) Likewise, Hambrick testified that an individual who had to lie down for two to three hours at a time would not be able to perform any work. (R. at 220-21.) Finally, Hambrick testified that if an individual had pain that significantly impacted on his nerves, that would be a negative vocational factor significant for the jobs previously mentioned. (R. at 221.)

In rendering his decision, the ALJ reviewed records from Buchanan General Hospital; Wellmont Bristol Regional Medical Center; Merritt Physical Therapy & Rehabilitation, Inc.; Dr. Frank M. Johnson, M.D., a state agency physician; Bristol Neurological Associates; Highlands Neurosurgery; Life Recovery; Dr. Matthew W. Wood Jr., M.D.; University of Virginia Health System; B. Wayne Lanthorn, Ph.D., a licensed clinical psychologist; and Dr. J. Thomas Hulvey, M.D.

The record shows that Dales was seen at Buchanan General Hospital from May 1, 2000, through November 7, 2000. (R. at 103-11.) On May 1, 2000, he complained of bilateral epicondylar pain for the previous three months. (R. at 110.) He was diagnosed with bilateral lateral epicondylitis, was prescribed Naprelan and was advised to apply heat. (R. at 110.) On September 25, 2000, Dales complained of left hip pain. (R. at 109.) A physical examination revealed tenderness of the left superior gluteus. (R. at 109.) He was diagnosed with a left gluteal strain. (R. at 109.) By the following month, Dales reported worsening lower back pain aggravated by bending. (R. at 108.) A physical examination revealed left lumbar paraspinous muscle spasm. (R. at 108.)

Dales was diagnosed with acute lumbar strain. (R. at 108.) An MRI of the lumbar spine was recommended. (R. at 108.) Later that month, Dales reported a work-related injury to his back resulting in numbness and aches worsened by sitting. (R. at 107.) A physical examination revealed tenderness of the left lumbar paraspinal muscles at the L4-L5 level with spasm and positive straight leg raising with low back pain. (R. at 107.) He was again diagnosed with acute lumbar strain. (R. at 107.) Dales was excused from work for approximately one week. (R. at 107.) He was advised to continue Naprelan and was prescribed Zanaflex. (R. at 107.) On October 31, 2000, Dales saw Clint Owens, a physical therapist at Buchanan General Hospital, for an initial physical therapy evaluation. (R. at 105-06.) Dales rated his pain on a scale of one to 10, with 10 being the worst pain, as a 10 at its worst, a three to four at its best and a three to four at that time. (R. at 105.) He described his pain as being located in the low back area with radiation into the left lateral thigh, lateral leg and into the foot. (R. at 105.) Dales reported aggravation of the pain with extended sitting or riding. (R. at 105.) Owens noted that Dales walked with decreased weight bearing and stance time on the left lower extremity. (R. at 105.) He had decreased range of motion of the trunk with flexion reduced 75 percent with increased pain in the back and left lower extremity. (R. at 105.) However, Dales's extension and right lateral flexion were within normal limits and pain free. (R. at 105.) Dales's deep tendon reflexes were present and equal bilaterally for the quadriceps and Achilles' tendon. (R. at 105.) Light touch discrimination was present and equal throughout both lower extremity dermatomes. (R. at 105.) Dales exhibited increased tenderness with fingertip palpation in the left posterior superior iliac spine and increased tone in the lumbosacral paraspinals. (R. at 105.) He had 5/5 strength in the bilateral lower extremities. (R. at 105.) Owens opined that Dales had "good rehab potential." (R. at 106.) He applied

moist heat with simultaneous electrical stimulation to the lumbosacral paraspinals. (R. at 106.) Dales underwent an MRI of the lumbar spine on November 7, 2000, which revealed a moderate sized disc protrusion at the L5-S1 level on the left side causing moderate impingement of the S1 nerve root. (R. at 111.)

Dales was seen at Merritt Physical Therapy & Rehabilitation, Inc., for 15 visits from November 2, 2000, through January 19, 2001. (R. at 137-47.) During this time period, Dales showed steady improvement in all symptoms, but he continued to complain of low back and lower extremity pain that varied in intensity and frequency. (R. at 139.) Dia Rife, a physical therapist, noted that Dales's range of motion and strength were within normal limits, and Dales had no difficulty performing the therapeutic exercises. (R. at 139.) He was instructed to continue a home exercise program. (R. at 139.) Rife opined that Dales may be a good candidate for a work rehabilitation program to further maximize his potential to return to work. (R. at 139.)

Dales was seen by Dr. Matthew W. Wood Jr., M.D., with complaints of back pain and left leg pain on November 14, 2000. (R. at 161-62.) Dr. Wood noted that Dales was alert and cooperative. (R. at 161.) He had an antalgic gait favoring the left leg. (R. at 161.) Palpation of the back revealed marked muscle spasm. (R. at 161.) No step-off or deformity was noted. (R. at 161.) A physical examination revealed limited forward flexion, extension and side-to-side movement. (R. at 161.) His cranial nerves were intact and motor strength was 5/5. (R. at 161.) Dales exhibited some decreased sensation of the left S1 dermatome, but deep tendon reflexes were symmetric. (R. at 161.) Straight leg raising was markedly positive on the left with pain

at 10 degrees . (R. at 161.) Dr. Wood noted that Dales's MRI revealed a large left L5-S1 herniated disc with frank encroachment on the nerve root. (R. at 162.) Dr. Wood discussed both surgical and nonsurgical treatment options for Dales to consider. (R. at 162.) He was prescribed Darvocet ant was excused from work until the following week. (R. at 162-63.) Dales returned on November 21, 2000, reporting that his condition had worsened within the previous week. (R. at 160.) He stated that he wished to proceed with surgery. (R. at 162.) Dales was released from work. (R. at 160.)

On November 28, 2000, Dales underwent a left L5-S1 partial laminectomy and disckectomy by Dr. Wood. (R. at 134-35.) Dales's postoperative diagnosis was a huge extruded L5 disc rupture with intractable left leg pain. (R. at 134.) The surgical note reveals that he tolerated the procedure well. (R. at 135.) By the following day, Dales reported good relief of his symptoms, and he was up and ambulatory. (R. at 124.) He was prescribed Lortab and advised to walk one to two miles per day. (R. at 123.)

On December 5, 2000, Dales reported much improved leg pain. (R. at 166.) By December 20, 2000, Dr. Wood reported that Dales was recovering well from surgery. (R. at 165.) At that time, Dales reported walking daily, noting an improved range of motion. (R. at 165.) A physical examination revealed a nearly normal range of motion and negative straight leg raising. (R. at 165.) He exhibited mild lower back pain at 80 or 90 degrees, but the hamstrings were supple, tendon reflexes were 1+ throughout and left ankle jerk was detectable. (R. at 165.) Dales's station and gait were normal. (R. at 165.) Dr. Wood opined that Dales needed physical therapy to

reach maximum medical improvement. (R. at 165.) He was released from work until January 24, 2001. (R. at 164.) At that time, Dr. Wood noted that Dales had made significant progress with physical therapy. (R. at 168.) He noted typical postoperative stiffness in the lower back and post compressive radiculopathy with occasional aching in the leg, but he further noted that Dales was neurologically intact. (R. at 168.) Straight leg raising was only mildly positive at 80 degrees with minimal hamstring tightness. (R. at 168.) Tendon reflexes were 1+ throughout and there was no focal weakness. (R. at 168.) Dr. Wood felt that further therapy would not benefit Dales. (R. at 168.) Dr. Wood opined that Dales had a 10 percent impairment to the left leg. (R. at 168.)

Dr. Wood completed a physical capacities evaluation on February 28, 2001. (R. at 176.) He concluded that Dales could sit, stand and walk for a total of six hours each, but for only two hours each without interruption. (R. at 176.) Dr. Wood further concluded that Dales could lift items weighing up to 20 pounds frequently and up to 50 pounds occasionally. (R. at 176.) He noted that Dales could grasp, push and pull arm controls and perform fine manipulation. (R. at 176.) Dr. Wood further noted that Dales could use his feet to push and pull leg controls. (R. at 176.) He found that Dales could occasionally bend, squat, crawl and climb and could frequently reach. (R. at 176.) Dr. Wood concluded that Dales was only mildly restricted in his abilities to work around unprotected heights and moving machinery and to drive automotive equipment. (R. at 176.) By March 2003, Dales returned to Dr. Wood reporting worsening back and leg pain. (R. at 170.) He denied any new injury. (R. at 170.) However, Dr. Wood noted that Dales was “in absolutely no distress.” (R. at 170.) Straight leg raising was negative, tendon reflexes were 1+ at the knees and absent at

both ankles and his gait was normal. (R. at 170.) Dales could flex to 70 degrees and extend to 30 degrees. (R. at 170.) Dr. Wood noted no changes in Dales's restrictions. (R. at 170.)

On March 26, 2003, Dales underwent an MRI at Buchanan General Hospital. (R. at 158-59.) The MRI revealed an L4-L5 minimal bulging disc barely touching the anterior thecal sac. (R. at 158.) No other significant changes were noted. (R. at 159.) On April 8, 2003, Dales complained of back pain with sitting in classes lasting more than one hour. (R. at 178.) Dr. Wood noted that Dales was in no distress and tendon reflexes were 2+ at the knees and 1+ at both ankles. (R. at 178.) He noted that the MRI of the previous month revealed only early degenerative changes and minimal postoperative changes. (R. at 178.) Dr. Wood noted no evidence whatsoever of a recurrent disc protrusion or continued nerve root compression. (R. at 178.) An electromyogram, ("EMG"), of Dales's symptomatic lower extremity was normal. (R. at 178.) Dr. Wood encouraged Dales to stretch. (R. at 178.) He again noted that Dales had reached maximum medical improvement. (R. at 178.) Dales was prescribed Bextra and Ultram. (R. at 177.)

On August 8, 2003, Dr. Frank M. Johnson, M.D., a state agency physician, completed a Physical Residual Functional Capacity Assessment. (R. at 148-55.) Dr. Johnson concluded that Dales could perform light work, but that he was limited in his ability to push and/or pull with his lower extremities. (R. at 149.) He further concluded that Dales could frequently climb and balance, but that he could only occasionally stoop, kneel, crouch and crawl. (R. at 150.) Dr. Johnson found no manipulative, visual, communicative or environmental limitations. (R. at 151-52.) Dr.

Johnson's findings were affirmed by Dr. F. Joseph Duckwall, M.D., another state agency physician, on October 14, 2003. (R. at 155.)

Dales was seen at Life Recovery for an admission assessment on October 8, 2003. (R. at 179-83.) At that time, Dales reported chronic pain, crying spells, irritability, difficulty concentrating, restlessness and insomnia. (R. at 179.) It was noted that Dales was friendly and cooperative, but with a sad expression. (R. at 182.) The counselor noted decreased motor behavior, normal speech, a depressed mood and a restricted affect. (R. at 182.) Dales's memory was intact. (R. at 182.) He expressed feelings of worthlessness and hopelessness, but denied then-current thoughts of harming himself or others. (R. at 182.) His judgment and insight were deemed fair to good. (R. at 182.) Dales was diagnosed with major depression, recurrent and severe, without psychotic features. (R. at 183.) On October 22, 2003, Dales's mood was described as dysphoric and his affect as blunted. (R. at 184.) He reported marital conflict. (R. at 184.) He again was diagnosed with a major depressive disorder, recurrent and moderate, without psychotic features. (R. at 184.)

On November 21, 2003, Dales saw Dr. J. Thomas Hulvey, M.D., at the University of Virginia Health System, at Dr. Sutherland's referral. (R. at 185-86, 198-99.) A physical examination revealed no back spasm, negative heel-toe gait and negative straight leg raising bilaterally. (R. at 198.) Deep tendon reflexes were symmetric and active. (R. at 198.) X-rays of the lumbar spine revealed moderate degenerative disc disease at the L5-S1 level with vacuum phenomenon. (R. at 185.) A small left renal calculus also was noted. (R. at 185.) Dr. Hulvey diagnosed Dales with ongoing residual radiculopathy following lumbar disc surgery. (R. at 199.) Dr.

Hulvey noted that smoking cessation and limiting automobile travel would be helpful. (R. at 199.) He noted that, beyond that, conservative treatment and continuation of physical therapy would be important. (R. at 199.)

Dales saw B. Wayne Lanthorn, Ph.D., a licensed clinical psychologist, on December 29, 2003, for a psychological evaluation at his counsel's request. (R. at 187-95.) Lanthorn noted that Dales was well-oriented, exhibited no signs of psychotic processes, evidenced no indications of delusional thinking and denied ever having hallucinations. (R. at 188.) Lanthorn described Dales's affect as "quite blunt and flat," and he stated that he had erratic to poor eye contact. (R. at 188.) Lanthorn described Dales's overall mood as predominantly depressed with signs of anxiety. (R. at 188.) Dales reported experiencing significant depression as well as anxiety and panic disorder. (R. at 190.) He stated that his depression began following his work injury and had continued to worsen. (R. at 190.) He stated that his irritable and labile moods caused significant marital problems. (R. at 190.) Dales reported poor energy and difficulties with concentration and short-term memory. (R. at 190.) He denied any suicidal or homicidal ideations. (R. at 190.) Dales further reported anxiety and panic attacks lasting from a few minutes to significantly longer. (R. at 191.)

Dales reported that on a typical day, he would get up and sit on the couch, watch television, start "stirring around," check the mail, do a few chores and help with the baby before returning to the couch. (R. at 190.) He stated that he tried to help clean when he could and would accompany his wife to the grocery store, mainly to watch the baby. (R. at 190.) Dales stated that he enjoyed reading. (R. at 190.) Lanthorn administered the Wechsler Adult Intelligence Scale-Third Edition, ("WAIS-

III”), test, and Dales obtained a verbal IQ score of 94, a performance IQ score of 98 and a full-scale IQ score of 96, placing him in the average range of intelligence. (R. at 191.) Lanthorn also administered the Pain Patient Profile, (“P/3”), on which Dales scored in the most severe range on all scales. (R. at 192.) The Personality Assessment Inventory, (“PAI”), revealed that Dales was struggling with a significant depressive experience, a great deal of tension, an unusual degree of concern about his physical functioning and health matters and thought processes marked by confusion, distractibility and difficulty concentrating. (R. at 192-93.)

Lanthorn diagnosed Dales with major depressive disorder, single episode, severe, generalized anxiety disorder, pain disorder associated with psychological factors and a general medical condition, chronic, panic disorder without agoraphobia and a then-current Global Assessment of Functioning, (“GAF”), score of 60.⁶ (R. at 194.) Lanthorn opined that Dales had at least moderate limitations in his overall adaptability skills, and he recommended that Dales continue seeking psychotherapy and be evaluated by a psychiatrist. (R. at 195.)

Dales was again seen at Life Recovery on January 6, 2004, at which time he reported irritability, frustration, sadness, attention span problems and crying spells. (R. at 196.) His mood was described as dysphoric and his affect as blunted. (R. at 196.) Dales was again diagnosed with major depressive disorder, recurrent, moderate.

⁶The GAF scale ranges from zero to 100 and “[c]onsider[s] psychological, social, and occupational functioning on a hypothetical continuum of mental health-illness.” DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS FOURTH EDITION, (“DSM-IV”), 32 (American Psychiatric Association 1994). A GAF score of 51 to 60 indicates that an individual has “[m]oderate symptoms ... OR moderate difficulty in social, occupational, or school functioning” DSM-IV at 32.

(R. at 196.)

III. Analysis

The Commissioner uses a five-step process in evaluating DIB claims. *See* 20 C.F.R. § 404.1520 (2004); *see also Heckler v. Campbell*, 461 U.S. 458, 460-62 (1983); *Hall v. Harris*, 658 F.2d 260, 264-65 (4th Cir. 1981). This process requires the Commissioner to consider, in order, whether a claimant 1) is working; 2) has a severe impairment; 3) has an impairment that meets or equals the requirements of a listed impairment; 4) can return to his past relevant work; and 5) if not, whether he can perform other work. *See* 20 C.F.R. § 404.1520 (2004). If the Commissioner finds conclusively that a claimant is or is not disabled at any point in this process, review does not proceed to the next step. *See* 20 C.F.R. § 404.1520(a) (2004).

Under this analysis, a claimant has the initial burden of showing that he is unable to return to his past relevant work because of his impairments. Once the claimant establishes a prima facie case of disability, the burden shifts to the Commissioner. To satisfy this burden, the Commissioner must then establish that the claimant has the residual functional capacity, considering the claimant's age, education, work experience and impairments, to perform alternative jobs that exist in the national economy. *See* 42 U.S.C.A. § 423(d)(2) (West 2003); *McLain v. Schweiker*, 715 F.2d 866, 868-69 (4th Cir. 1983); *Hall*, 658 F.2d at 264-65; *Wilson v. Califano*, 617 F.2d 1050, 1053 (4th Cir. 1980).

By decision dated April 28, 2004, the ALJ denied Dales's claim for benefits.

(R. at 14-20.) The ALJ found that Dales met the disability insured status requirements of the Act through the date of the decision. (R. at 19.) The ALJ also found that the medical evidence established that Dales had severe impairments, namely residuals of a traumatic back injury, degenerative disc disease and situational depression, but he found that Dales did not have an impairment or combination of impairments listed at or medically equal to one listed at 20 C.F.R. Part 404, Subpart P, Appendix 1. (R. at 19.) The ALJ further found that Dales's allegations regarding his limitations were not totally credible. (R. at 20.) The ALJ found that Dales had the residual functional capacity to perform light work with only occasional stooping, kneeling, crouching and crawling. (R. at 20.) Thus, the ALJ found that Dales could not perform his past relevant work. (R. at 20.) Based on Dales's age, education, work experience and residual functional capacity and the testimony of a vocational expert, the ALJ found that other jobs existed in the national economy that Dales could perform, including those of a ticket taker and a sales attendant. (R. at 20.) Therefore, the ALJ found that Dales was not disabled at any time through the date of his decision and was not eligible for DIB benefits. (R. at 20.) *See* 20 C.F.R. § 404.1520(g) (2004).

As stated above, the court's function in the case is limited to determining whether substantial evidence exists in the record to support the ALJ's findings. The court must not weigh the evidence, as this court lacks authority to substitute its judgment for that of the Commissioner, provided her decision is supported by substantial evidence. *See Hays*, 907 F.2d at 1456. In determining whether substantial evidence supports the Commissioner's decision, the court also must consider whether the ALJ analyzed all of the relevant evidence and whether the ALJ sufficiently explained her findings and her rationale in crediting evidence. *See Sterling Smokeless*

Coal Co. v. Akers, 131 F.3d 438, 439-40 (4th Cir. 1997).

Dales argues that the ALJ erred by finding that he could perform a diminished range of light work without soliciting the testimony of a medical or psychological expert to testify at his hearing. (Brief In Support Of Plaintiff's Motion For Summary Judgment, ("Plaintiff's Brief"), at 13-14.) He further argues that the ALJ erred by rejecting the assessment of psychologist Lanthorn, thereby substituting his own judgment for that of an expert. (Plaintiff's Brief at 14-15.)

The ALJ found that Dales had the residual functional capacity to perform light work, limited by an occasional ability to stoop, kneel, crouch and crawl. (R. at 20.) I find that substantial evidence supports this finding regarding Dales's physical work-related abilities, thereby negating the need for expert medical testimony.

The record reveals that following Dales's back surgery, he received complete relief of his symptoms. (R. at 165-66, 168.) However, Dales's condition eventually began to worsen again. (R. at 170.) Nonetheless, the record reveals that Dales's back impairment consists of mild degenerative changes, including an L4-L5 bulging disc. (R. at 158, 178, 185.) Physical examinations consistently revealed negative straight leg raising, (R. at 170, 198), good flexion and extension, (R. at 170), a normal gait, (R. at 170), and symmetric and active deep tendon reflexes, (R. at 170, 198). Despite complaints of worsening back and leg pain in March 2003, Dr. Wood noted that Dales was "in absolutely no distress." (R. at 170, 178.) An EMG of Dales's symptomatic lower extremity was normal at that time. (R. at 178.) Dr. Wood did not change

Dales's restrictions, and Dr. Hulvey recommended conservative treatment. (R. at 170, 199.) Dr. Johnson, a state agency physician, concluded that Dales could perform light work, diminished by a limitation in his ability to push and/or pull with the lower extremities, and an ability to only occasionally stoop, kneel, crouch and crawl. (R. at 151-52.) These findings were affirmed by another state agency physician. (R. at 155.) These findings also are supported by Dales's activities of daily living, including attending college classes, grocery shopping with his wife, helping some with household chores and helping care for his three children. (R. at 190, 205.) For these reasons, I find that the ALJ's findings with regard to Dales's physical residual functional capacity are supported by substantial evidence, thereby negating the need for expert medical testimony.

I next find that the ALJ erred by failing to solicit the testimony of a psychological expert in determining the impact of Dales's mental impairment on his work-related abilities. "In the absence of any psychiatric or psychological evidence to support [his] position, the ALJ simply does not possess the competency to substitute [his] views on the severity of plaintiff's psychiatric problems for that of a trained professional." *Grimmett v. Heckler*, 607 F. Supp. 502, 503 (S.D. W. Va. 1985) (citing *McLain*, 715 F.2d at 869; *Oppenheim v. Finch*, 495 F.2d 396, 397 (4th Cir. 1974)). The only psychological evidence contained in the record is from Life Recovery and psychologist Lanthorn. In his decision, the ALJ rejected, without explicitly stating so, Lanthorn's opinion. (R. at 17.) Moreover, the ALJ neglected to address, in any detail, the counseling notes from Life Recovery. (R. at 17.) Nonetheless, the ALJ concluded that Dales suffered from situational depression, an

impairment which he deemed as severe. (R. at 17.) Because the ALJ either rejected or neglected to discuss the only psychological evidence contained in the record, I find that he improperly substituted his own opinion for that of an expert.

Although Dales did not raise such an argument in his brief, I note that the hypothetical question posed to the vocational expert, and upon which the ALJ concluded that a significant number of jobs existed in the national economy that Dales could perform, did not contain any mental impairments despite the ALJ's finding that Dales suffered from a severe mental impairment. "In order for a vocational expert's opinion to be relevant or helpful, it must be based upon a consideration of all ... evidence in the record, ... and it must be in response to proper hypothetical questions which fairly set out all claimant's impairments." *See Walker v. Bowen*, 889 F.2d 47, 50 (4th Cir. 1989) (citations omitted). The Commissioner may not rely upon the answer to a hypothetical question if the hypothesis fails to fit the facts. *See Swaim v. Califano*, 599 F.2d 1309 (4th Cir. 1979). Thus, because the hypothetical did not contain Dales's severe mental impairment as found by the ALJ, it is incomplete and cannot constitute substantial evidence to support the ALJ's decision that Dales could perform a significant number of jobs in the national economy.

For these reasons, I find that substantial evidence does not support the ALJ's finding that Dales could perform a significant number of jobs in the national economy and that he substituted his opinion for that of an expert. Given these findings, I will not address Dales's remaining argument that the ALJ erred by rejecting psychologist Lanthorn's opinion.

IV. Conclusion

For the foregoing reasons, the Commissioner's motion for summary judgment will be denied, the Commissioner's decision to deny benefits will be vacated, and the case will be remanded to the ALJ to secure psychological expert testimony regarding the impact of Dales's severe mental impairment upon his work-related abilities and to secure vocational expert testimony regarding the same.

An appropriate order will be entered.

DATED: This 9th day of March, 2005.

/s/ Pamela Meade Sargent
UNITED STATES MAGISTRATE JUDGE